VIRGINIA LAW REGISTER

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Virginia Legislation 1916—Continued.

At the time that we made a brief reference in our April number to the Acts of Assembly passed at the last session of the Virginia General Assembly we had only received up to and including page 64. At the time of going to press 384 pages have been published. We continue our reference to laws which seem to be of general interest.

On page 64, Section 3561 of the Virginia Code is so amended as to require judgments to be indexed in the name of both *plaintiff* and defendant, and that no judgment should be regarded as docketed as to any *defendant* in whose name is not so indexed. The word "it" has evidently been omitted in this act after the words "in whose name," and we suppose the court will so construe it.

On page 66 the court is given power upon the conviction in a court of record of the charge of larceny, forgery or uttering, etc., any forged writing, to suspend sentence during good behavior of the person convicted, but only to apply to a first conviction.

On the same page is an act prohibiting the purchase or sale, or offering to sell, any wild turkeys.

On page 67, Section 2564 of the Code is amended so as to bar the right of curtesy of the husband in the share of his wife in land sold for partition, just as the wife is barred of dower, whether a party to the suit or not.

On page 69, Section 2257 of the Code is amended in regard to divorce from the bond of matrimony, adding the words "subsequent to the marriage," before the words "has been sentenced to confinement in the penitentiary of this state," and after these last words has been added, "or of any other state of the United States, or a confinement in a penitentiary of the United States, and cohabitation has not been resumed after such confinement."

This amendment is exceedingly awkwardly drawn, for the words in parenthesis ("in which case no pardon granted to the party so sentenced shall restore such party to his or her conjugal rights"); immediately follow the sentence, "and cohabitation has not been resumed after such confinement."

Pages 70 to 88 are taken up with the Torrens system for the registration of land, as to which one of our associates promises an article later on.

On page 89 is a most remarkable act, the reason of which we cannot understand, and the danger of it to suitors in the courts is hard to be over-estimated. It provides, "that no suit for the purpose of restraining the assessment or collection of any tax, state or local, shall be maintained in any court in this Commonwealth except when the party has no adequate remedy at law; provided this act shall not affect any pending suit." This act is made an emergency act and is now in force.

On page 110 is an act prohibiting the manufacture and sale of adulterated, mis-branded or deleterious stock, cattle and poultry feeds.

On page 112 is an act authorizing cities and towns of the Commonwealth to acquire property adjoining parks, monuments or other public property, and to dispose of the same.

On page 116, Section 3286 of the Code is amended as follows; after the words "from which the plaintiff claims interest," the following words are inserted: "and shall serve the defendant at the same time and in the same manner that the process or summons to commence the suit or action is served with a copy of such affidavit, certified by the clerk of the court in which this suit or action is brought, together with a copy of the account (when an account is filed with the declaration)."

On page 122 is a most important act amending Section 3560 of the Code in regard to the way in which judgments must be docketed. The act makes a most radical and valuable change but does not become effective until the 1st day of January, 1917, in order, we suppose, to give the Attorney General of the State, with three experienced court clerks of the State, to be selected by him, opportunity to prepare a suitable judgment lien book.

On page 134 is an act, Section 44A of which refers to the Collateral Inheritance Tax.

Page 136 amends Section 1398 of the Code in relation to conveyances of real estate for religious and charitable purposes.

On page 158 is an act debarring life insurance companies from pleading that the insured committed suicide or was put to death by execution under the law, unless in the body of the insurance policy there is an express limitation or provision to the contrary, unless it can be shown to the satisfaction of court or jury that the insured intended suicide at the time he applied for the policy and actually carried out his intention. It also prevents the company from pleading that a policy of life insurance is to be construed in accordance with the laws of some other place.

On page 208 is an act which might be well entitled "to protect parties who have unskillful or foolish scriveners to draw deeds of trust." It provides for the sale of property, real or personal, held subject to a deed or deeds of trust to secure the payment of money or any evidence of debt, where there is no date fixed for the payment thereof, and for the investment of the proceeds of sale under decree of court subject to the terms of said deed or deeds of trust.

Pages 216 to and including page 248 contain the Prohibition Bill—probably the most radical, remarkable and wonderful act ever passed by a Virginia Legislature. We hope at a later date to publish and comment upon this act.

Page 257 creates a State Department of Game and Inland Fisheries, and is a most admirable law, which we trust to see rigidly enforced.

Page 321 is found an act prohibiting the use of roller towels in public lavoratories.

Page 323 amends Section 2817 of the Code of 1887 in relation to interest on money. This act relates entirely to insurance company policies given to secure liens.

On page 325 is an act amending the act of March 14th, 1910 regulating employment bureaus or agencies.

On page 327 is an act providing upon petition of a majority of patrons of any school for placing a United States flag thereon

and authorizing the school authorities to pay for same. Had this been to provide a STATE flag, there might be some reason for this law, but as the United States does nothing for the public schools, and few of the country schools can make both ends meet, it seems to us that this is not only an unnecessary but an absurd act. Is it not a little of the hysterical patriotism, rather too much prevalent now-a-days?

On page 360 is an act amending Section 925 of the Code which is drawn to allow the board of Supervisors of a County or Council of a city to provide offices for various officials.

On page 362 is an amendment to Section 2992. This amendment does away with the necessity of filing interrogatories until the defendant shall appear.

Working the Roads—Constitutional Law: Involuntary Servitude.

It is seldom that there occurs in the dull dry pages of legal reports anything that suggests romance. Of course we except breach of promise and divorce cases and criminal prosecutions. Constitutional law has little in it to stir old dreams or revive ancient memories, and yet the case of Butler *v.* Perry, Sheriff, etc., decided by the Supreme Court of the United States last January, awoke in our bosom recollections of a long vanished youth and stirred emotions we thought long since dead.

For we recall with a pride no subsequent honour has ever evoked a notification that having attained the legal age we were expected on the ——— day of ————, in the year —— to attend with the proper utensils the overseer of the road at a given point on an ancient highway and work the day out or contribute seventy-five cents to the county treasury. We scorned the suggestion of seventy-five cents—first because we didn't possess at that time that much wealth, and second because we felt that working the road was equivalent to assuming the *toga virilis*. In vain our sire offered to contribute the necessary amount. We shouldered an ancient hoe and resorting to the place of assembly found about a dozen negroes lazily pecking in the ditches along the road and a lazy white individual super-

intending the job. The amazement—we might say consternation—with which our advent was received was astonishing to us. The white man, the overseer, remonstrated and suggested hiring a man. But no! We had come to work, and pulling off our coat we pitched in. At the end of two hours the overseer offered us a dollar and a half to quit—we were demoralizing the force. Two of the negro hands volunteered to do an extra day for us if we would retire, and the pressure finally became so strong we could not resist and returned home with a lame back and blistered hands, and minus the hoe, which was never recovered.

One can well imagine, then, our disgust to find that a man in Florida had not only refused to do this noble work, but had actually fought his way from court to court, until finally in the Supreme Court of the United States he had met his Waterloo and was sent back to serve thirty days in jail—the penalty in Florida for failing or refusing to work six days in a year on the roads, or pay the paltry sum of three dollars into the county treasury.

He appealed to the 13th Amendment as prohibiting "involuntary servitude except for crime." He proclaimed the "due process of law" clause in the 14th Amendment; but fourteen proved as unlucky a number as thirteen. The Supreme Court—McReynolds delivering the opinion—quoted Blackstone, Bk. 1, p. 357 and Vinogradoff's Eng. Society in the Eleventh Century, p. 82, to show that from time immemorial to work the public roads was *trinoda necessitas* and that Rome and England alike compelled the citizens to do this work. Our Colonies brought the custom with them and the Northwest Territory in 1792, in the teeth of language in the ordinance of 178 prohibiting "involuntary servitude," passed a law requiring every male inhabitant of sixteen years to work on the highways. The 13th Amendment, says the Court, was "adopted with reference to conditions existing since the foundation of our government and the term "involuntary servitude" was intended to cover those forms of compulsory labor akin to African slavery and introduced no novel doctrine with respect to services always treated as exceptional, and certainly was not intended to interdict en-

forcement of those duties which individuals owe to the State." Equally the 14th Amendment had no application, there being no merit in the claim that a man's labor is property, the taking of which without compensation by the State for building and maintenance of public roads violates the "due process" clause, that amendment being intended to preserve and protect fundamental rights long recognized under the Common Law system. And so Butler—by the way his front name as reported was Jake—was sent back to serve his term. We hope he was put to cracking rock for the roads; but as they have no rocks in Florida, pounding oyster shells should have been his task.

But the case recalled this old time memory to our aged brain and at the same time brought wonder to our souls that this archaic system had yet survived anywhere in these United States.

Due Process of Law.

In the same number of the Reporter (U. S. S. C. Advance Opinions—The Lawyers Co-op. Pub. Co. No. 8, pp. 258-287) there are six other cases in which the "due process" clause was evoked—each time in vain. The Seaboard Air line complained of a Georgia Statute requiring crossing or intersecting railways entering the same town or city to make and maintain track connections for the interchange of traffic at that point where the established facts show public necessity therefor. A very salutary statute it seems to us. And the Supreme Court upheld it.

The Kansas City, Fort Scott, etc., Railway Co., complained of an annual tax graduated according to paid-up capital, imposed upon domestic corporations under Kansas laws 1913, Chap. 135, on the privilege of being a corporation, the maximum charge being $2500 in the case of all corporations having a paid-up capital of $5,000,000, or more—the railroad in this case having lines extending into other states. But the Supreme Court dismissed the complaint, holding that such a tax is not a property tax, but merely a tax upon the privilege of being a corporation. The Receivers of the St. Louis & San Francisco R. R. Co. raised the same question, with the same result.

George W. Rogers and others complained that they as members of the Chamber of Commerce of Minneapolis were taxed by the City of Minneapolis, although the Chamber had no capital stock, transacted no business for profit, merely furnishing its members with a building and equipment to transact business upon the trading floor. The property of the Chamber was taxed and therefore the members complained of double taxation and that they were deprived of the equal protection of the laws because lodges, associated press rooms, churches, etc., were not taxed, and that many of the members resided out of the city and some out of the State. But the Supreme Court held that this taxation was a matter of local law with which the Federal Supreme Court has nothing to do and that even if this were the case there was no deprivation of the equal protection of the laws or lack of due process of law.

Dodge v. *Osborne Commr., etc.,* was the decision on the Income Tax, which was held to be constitutional and that there was no want of due process in the provisions of the U. S. law making an appeal to the Commissioner of Internal Revenue, after payment and his refusal to refund prerequisites to a suit to recover taxes erroneously or illegally assessed and collected.

Staunton v. *Baltic Mining Co.* raised many questions in regard to the various exemptions allowed in the income tax law, as to discriminations, deductions, etc., claiming that the due process clause was violated in many ways, but the Supreme Court overruled all of these objections.

Typee Realty Co. v. *Anderson* raised the question as to the retroactive effect of the income tax provisions of the Tariff Act of Oct. 3rd, 1913, and as to progressive rate feature of the same, claiming that they violated the "due process" clause. But again, the Supreme Court held there was no such violation of this clause in any of these features of the Act.

In No. 9 of the same Reporter, there are four cases in which this clause is depended upon to reverse the decision of the lower court.

In one case, *O'Keefe, Recvr.,* v. *U. S. & Interstate Commerce Commission,* affirmative relief was asked under the due process clause; the N. O. T. & M. R. R. asking that the order of the

Interstate Commerce Commission making certain divisions of rates where the carriers failed to agree amongst themselves or refused or neglected voluntarily to establish through or joint rates, be set aside because it interfered with certain arrangements it had made to build up its business by paying tap line railroads bonuses or rebates. But the Supreme Court not only declined to interfere but stated that this method of building up business was forbidden by Act of Congress.

In *Carolina Glass Co.* v. *South Carolina,* and in several other suits of this Company against state officials, the old Dispensary Act of South Carolina was once more in evidence. This suit was in consequence of the transfer of funds from the county dispensaries to the State Dispensary Commission. A corporation claimed money was due to it by the County Dispensary. The State Commission found that Corporation was indebted to the State. The Corporation sued the individual members of the State Dispensary for the money due them by the County and claimed that they were deprived of their money without due process of law by the removal of the funds from the County Dispensary. But the Supreme Court denied there was any such taking; held that a suit against the Dispensary officers was a suit against the State, and dismissed the proceedings.

It also held in one of the cases that neither the District Courts of the United States or the United States Circuit Courts of Appeals have any jurisdiction in a suit wherein the jurisdiction is invoked solely upon the ground that the controversy involved application of the Federal Constitution.

Embree v. *Kansas City, etc., Dist.* The due process clause was invoked in this case upset a statute of the State of Kansas in regard to the establishment of public road Districts. Adequate public notice was required to be given, under the statute, of the presentation of a petition for the creation of a road district and the time when it will be considered, allowing owners of land to present remonstrances and directing the petition and remonstrances to be heard by the County Court and allowing that Court to make such changes in the boundaries of the road districts as the public good may require, and that the boundaries should not be enlarged unless the owners of the lands not before

included consented in writing, or appeared at the hearing and were given an opportunity to present objections. The objection to the statute was that no hearing was given when the lands were appraised where the mode of enforcement of the tax assessed to meet the cost of any road to be built—although there was a suit in court, at which a time was given owners aggrieved by the valuations to have had a full hearing. The question of course was as to whether the lands adjoining the public roads or through which such roads went were benefitted by the roads to be established. The court held that the owners had sufficiently due process, because when the tax was sought to be enforced the owner had his day in court.

Title Guarantee, etc., v. *State of Idaho.* The same due process clause was evoked to avoid a statute clothing a bank commission with power to close the doors of a state bank, if on examination it was found to be insolvent, without waiting judicial proceedings. But the Supreme Court held that such a statute was not repugnant to this clause.

We refer to these cases not so much on account of their importance, but to call attention to the fact that the 14th Amendment to the Constitution has probably given rise to more litigation than almost any other one of the amendments, not even excepting the "Impairing the obligation of contracts" clause. The framers of this amendment were probably little aware of the broad scope of its terms. It, like the 13th Amendment, was passed more with reference to conditions in regard to the actually emancipated slaves than it was to anything else. The remarkable fact, however, is that in the vast majority of cases the appeal to this amendment has been in vain.

Corporation—Libel and Slander.

Can a corporation be held liable for slander? Or is it, that there can be "No agency in slander?" Is slander at all times the voluntary act of the speaker? Text-books are, at best, only secondary authority, and their value depends upon the care with which their authors examine the cases cited and their ability to draw correct conclusions

therefrom. Townshend on Slander and Libel, section 265, lays down the rule that a corporation cannot be guilty of slander because there can be "no agency in slander." Odgers on Slander and Libel makes the statement that a corporation cannot be held liable for slander, because "slander is the voluntary act of the speaker." He cites no authority to sustain his text, and none is cited in the notes to the American edition. Townshend cites no authority except Maloney *v.* Bentley (3 Comp., 210), which does not tend to support his text. That case was a suit against an individual for a libel, and neither slander nor the responsibility of a corporation was involved.

The case of Flaherty *v.* Motor Co., 153 N. W. 45, and the Behre Case, 100 Ga. 213, announce the doctrine that a corporation has no mind, and repeat the inconsistency, found in all cases affirming this doctrine, that a corporation has sufficient mind to be guilty of slander through the medium of an agent, if it directly authorizes or subsequently ratifies such slander. Also several courts have gone wrong and drawn an indefensible and entirely arbitrary distinction between a corporation's liability for libel and for slander on the strength of these and other dicta of the eminent authors named.

The Supreme Court of Mississippi, in Rivers *v.* Railway Co (90 Misc., 196), justly characterizes Townshend's statement as a ridiculous expression, and in that case the Court says that the statement that a corporation has not the "capacity" to commit slander, if not quite so ridiculous is as thoroughly exploded.

The true rule is laid down in the case of Grand Union Tea Co. *v.* Ford, C. C. A., Fourth Ct. (Va.), where the court held that a corporation is liable for the slanderous words of its agent, if the agent at the time is transacting the business of the corporation. and the slanderous words are spoken in the course of such business and in connection therewith. Washington Gas Light Company *v.* Lansden, 172 U. S., 534; Stewart *v.* Wright, quoting many cases, 147 Fed., 321; Waters Pierce Oil Company *v.* Bridwell, 147 S. W. 64; Hypes *v.* Southern Railway Company, 82 S. C., 315; Fensky *v.* Maryland Casualty Company, 174 S. W. 416; Sun Life Assurance Company *v.* Bailey, 101 Va. 434.

So it would seem to be the law that if an agent of a corpora-

tion before beginning or after finishing discussion of a business affair indulge in general defamation or abuse, the corporation should not be made responsible for it. But where an agent, as a part of the transaction of business and as his way of transacting business, indulges in defamation and abuse, there is no good reason why the master should not be held accountable. (*N. Y. Law Journal,* March 22, 1916).

The decision of the Appellate Division of the New York Supreme Court, First Department, in Kharas *v.* Barron C. Collier, Inc. (157 N. Y. Supp., 410), which, overruled Eichner *v.* Bowery Bank (24 App. Div., 63), held, in harmony with most of the recent cases, that a corporation may be liable for slander uttered by its agents while acting in the actual or implied scope of their employment.

The recent decision of the Court of Civil Appeals of Texas in Southwestern Telegraph & Telephone Co. *v.* Long (January, 1916, 183 S. W. 421) is to the same effect, the opinion being voluminous and in parts quite interesting.

The New York case held that a slander uttered by the manager of a corporation in giving an employee the reason for her discharge is within the scope of his employment, though he was not authorized to slander her. On the other hand, it is laid down that the same slander uttered by the manager in offering employment to another in place of the discharged employee was not within the scope of his employment. With the rule of liability practically administered as it was in this case, we cannot see how there could be any just complaint against the position which one court after another is now taking. The holding that an unnecessary slander uttered of plaintiff in engaging her successor was not within the scope of the servant's employment is in line with the decision of the Court of Appeals of Kentucky in Case *v.* Steel Coal Co. (162 Ky., 68), holding that an employer is not responsible for libel against an employee in the form of a loathsome joke written by a bookkeeper in stating an account with the employee.

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